Majlis Daerah Hulu Terengganu v Tenaga Nasional Bhd & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO NO T-02(W)-988–05 OF 2017
UMI KALTHUM, YAACOB MD SAM AND SURAYA OTHMAN JJCA
8 AUGUST 2019

Civil Procedure — Jurisdiction — High Court — Whether High Court wrongly declined to adjudicate claim — Defendant pursuant to consent judgment with plaintiff (local authority) paid settlement sum of RM7.5m and agreed costs to plaintiff's solicitor — Solicitor without notice to or permission of client retained almost half of the monies paid as his legal fees and costs and remitted balance to client — Plaintiff sued solicitor for payment of all monies he retained — Whether High Court wrongly held it had no jurisdiction to hear claim and that civil suit not the proper forum to make claim involving dispute over legal fees — Whether High Court did have jurisdiction to determine claim as plaintiff had pleaded solicitor's wrongful appropriation of the settlement monies — Whether High Court failed to appreciate settlement sum statutory revenue wholly payable to plaintiff which solicitor had no right to unilaterally appropriate to himself — Whether solicitor as stakeholder of settlement sum breached his constructive trusteeship over monies

The first respondent ('TNB') recorded a consent judgment with the appellant to pay the latter RM10m in unpaid assessment, and that since RM2,496,000 of that amount had already been paid, the balance RM7,504,000 together with agreed costs of RM200,000 would be paid to the appellant's solicitor, Messrs Mokhtar Ngah & Co, owned by the second respondent ('Mokhtar'). On receiving the RM7,504,000 and the agreed costs, Mokhtar retained the entire costs amount as well as RM3,152,250 from the RM7,504,000 as his professional fees before remitting the balance RM4,351,750 to the appellant. The appellant sued TNB and Mokhtar to: (a) set aside the consent judgment on the ground Mokhtar had entered into it without the appellant's consent and also because it was ultra vires the Local Government Act 1976 ('the LGA'); and (b) order Mokhtar to pay the appellant the RM3,352,250 he had retained from the monies paid by TNB. The High Court dismissed the suit. It refused to set aside the consent judgment and said it had no jurisdiction to determine the RM3,352,250 claim on the ground that a civil suit was not the right forum for such a claim and that a matter involving a dispute over legal fees should be taken up under the Legal Profession Act 1976 ('the LPA'). The appellant appealed against the whole of the decision but later discontinued its appeal against TNB, leaving the appeal only against the High Court's refusal to entertain the monetary claim against Mokhtar. The appellant argued that the High Court erred in holding that it had no jurisdiction to entertain the claim

because: (i) it had been pleaded that Mokhtar had wrongfully appropriated the sum; (ii) the monies paid by TNB under the consent; judgment was statutory revenue payable to the appellant under s 39 of the LGA and had to be transmitted in its entirety to the appellant under s 40 of the LGA; (iii) Mokhtar's arbitrary appropriation of the RM3,352,250 violated the LGA and was tantamount to a breach of the constructive trust he had over those monies; (iv) Mokhtar had no lien over the monies paid by TNB; even if he did, it could not be enforced because he had failed to apply for a charging order from the court under s 123 of the LPA to retain the monies pending taxation of his bill under s 126 of the LPA; and (v) the appellant never agreed to allow Mokhtar to retain any part of the monies as his legal fees and costs. Mokhtar, who was struck off the Rolls of Advocates and Solicitors after being found guilty of gross professional misconduct in the matter, contended, inter alia, that he had an oral agreement with the Yang di-Pertua of the appellant that he could deduct and retain the RM3,352,250 from the monies he received from TNB as his professional fees and costs.

Held, allowing the appeal and allowing the appellant's claim for RM3,352,250 against Mokhtar:

(1) The trial judge was wrong in declining to entertain the appellant's claim against Mokhtar for the RM3,352,250. The judge had the jurisdiction to adjudicate the claim since the appellant had specifically pleaded the wrongful misappropriation by Mokhtar and had particularised in detail the nature and conduct that amounted to the misappropriation. The judge had failed to appreciate that the monies that were taken by Mokhtar were statutory revenue and as a solicitor entrusted with the monies by the appellant, the appropriation by Mokhtar without the appellant's consent was untenable. The civil suit was the correct forum to adjudicate the claim (see paras 25 & 39).

(2) Being statutory revenue, the monies that were paid by TNB to Mokhtar's firm under the consent judgment had to be transmitted in its entirety to the appellant and Mokhtar's retention of the RM3,352,250 violated the Local Government Act 1976 and amounted to a breach of trust. The monies were paid to Mokhtar's firm as stakeholder and he held the monies as constructive trustee for the appellant (see para 27).

(3) Mokhtar failed to apply to court for a charging order under s 123 of the Legal Profession Act 1976 pending taxation of his bill of costs under s 126 thereof. Any right or lien he might have had over the monies he received under the consent judgment, whether under common law or statute, was not enforceable unless he had obtained a charging order from the court in which he had acted as solicitor (see paras 33–34).

(4) The notes of evidence showed that Mokhtar failed to prove that there was any oral agreement between him and the Yang di-Pertua of the appellant

(PW3) to the effect that he could deduct the RM3,352,250 from the monies he received from TNB as his professional fees and costs (see para 36).

[Bahasa Malaysia summary

Responden pertama ('TNB') telah merakamkan penghakiman persetujuan dengan perayu untuk membayar perayu RM10 juta sebagai taksiran tertunggak, dan sejak RM2,496,000 jumlah tersebut telahpun dibayar, baki RM7504,000 berserta dengan kos RM200,000 yang dipersetujui akan dibayar kepada peguam perayu, Tetuan Mokhtar Ngah & Co yang dimiliki oleh responden kedua ('Mokhtar'). Selepas menerima RM7,504,000 sebagai yuran professionalnya, Mokhtar telah memegang keseluruhan jumlah kos dan juga RM3,152,250 daripada RM7,504,000 sebagai yuran professionalnya sebelum meremitkan baki RM4,351,750 kepada perayu. Perayu menyaman TNB dan Mokhtar untuk: (a) mengetepikan penghakiman persetujuan atas alasan Mokhtar telah memasukinya tanpa izin perayu dan juga kerana ianya ultra vires Akta Kerajaan Tempatan 1976 ('AKT'); dan (b) memerintahkan Mokhtar untuk membayar perayu RM3,352,250 yang dia telah simpan daripada wang yang dibayar oleh TNB. Mahkamah mengetepikan guaman tersebut. Ia enggan untuk mengetepikan penghakiman persetujuan dan menyatakan ianya tidak mempunyai bidang kuasa untuk menentukan tuntutan RM3,352,250 atas alasan bahawa satu guaman sivil bukanlah forum yang sesuai untuk tuntutan sedemikian rupa dan satu perkara yang melibatkan pertelingkahan berkenaan yuran guaman sepatutnya dibuat di bawah Akta Profesion Undang-Undang 1976 ('APU'). Perayu merayu terhadap keputusan tersebut, tetapi kemudiannya tidak meneruskan rayuannya terhadap TNB dan hanya meneruskan rayuannya terhadap keengganan Mahkamah Tinggi untuk mendengar tuntutan kewangannya terhadap Mokhtar. Perayu menghujahkan bahawa Mahkamah Tinggi khilaf dalam memutuskan bahawa ianya tidak mempunyai bidangkuasa untuk mendengar tuntutan tersebut kerana: (i) ianya telah diplid bahawa Mokhtar telah secara salah mengambil jumlah tersebut; (ii) wang dibayar oleh TNB di bawah penghakiman persetujuan merupakan pendapatan statutori yang perlu dibayar kepada perayu dibawah s 39 AKT dan perlu dipindahkan secara keseluruhannya kepada perayu di bawah s 40 AKT; (iii) tindakan mokhtar secara sembarangan mengambil RM3,352,250 melanggar AKT dan terjumlah kepada pelanggaran amanah konstruktif terhadap wang tersebut; (iv) Mokhtar tidak mempunyai apa-apa lien terhadap wang yang dibayar kepada TNB; dan sekiranya dia mempunyai lien sekalipun, ianya tidak boleh dikuatkuasakan kerana dia gagal untuk memohon untuk perintah cagaran di bawah s 123 APU untuk menyimpan wang tersebut menantikan penaksiran bilnya di bawah s 126 APU; dan (v) perayu tidak pernah bersetuju untuk membenarkan Mokhtar untuk menyimpan apa-apa bahagian wang tersebut sebagai yuran dan kosnya. Mokhtar yang telah dikeluarkan daripada daftarai peguambela dan peguamcara selepas didapati bersalah atas salah laku profesional dalam perkara tersebut, menghujahkan,

A antara lain, dia mempunyai perjanjian lisan dengan Yang di-Pertua perayu yang dia boleh menolak dan menyimpan RM3,352,250 daripada wang yang dia terima daripada TNB sebagai yuran professional dan kosnya.

B **Diputuskan**, membenarkan rayuan dan membenarkan tuntutan perayu untuk RM3,352,250 terhadap Mokhtar:

(1) Hakim bicara terkhilaf dalam enggan untuk mendengar tuntutan perayu terhadap Mokhtar untuk RM3,352,250. Hakim mempunyai bidang kuasa untuk menghakimi tuntutan tersebut memandangkan perayu
C telah secara spesifik memplidkan pengambilan salah oleh Mokhtar dan membutirkan secara terperinci sifat dan pelakuan yang terjumlah kepada pengambilan salah tersebut. Hakim gagal untuk mengamati fakta bahawa wang oleh Mokhtar merupakan hasil statutori dan sebagai seorang peguam yang diamanahkan dengan wang oleh perayu,
D pengambilan oleh Mokhtar tanpa keizinan perayu tidak dapat dipertahankan. Guaman sivil merupakan forum yang tepat untuk mengadili tuntutan tersebut (lihat perenggan 23 & 39).

(2) Sebagai hasil statutori, wang yang dibayar oleh TNB kepada firma
E Mokhtar di bawah penghakiman persetujuan perlu dihantar secara keseluruhanya kepada perayu dan penyimpanan oleh Mokhtar atas RM3,352,250 melanggar AKT dan terjumlah kepada pecah amanah. Wang yang dibayar kepada firma Mokhtar sebagai pemegang amanah harta dan dia telah memegang wang tersebut sebagai pemegang amanah
F konstruktif untuk perayu (lihat perenggan 27).

(3) Mokhtar gagal untuk memohon kepada mahkamah untuk perintah cagaran di bawah s 123 APU menantikan penaksiran bil kosnya di bawah s 126 yang sama. Apa-apa hak atau lien yang mungkin dia milik terhadap
G wang yang diterima di bawah penghakiman persetujuan tersebut, sama ada di bawah common law ataupun statut, tidak boleh dikuatkuasakan kecuali dia mendapat perintah cagaran daripada mahkamah yang amna dia bertindak sebagai peguam (lihat perenggan 33–34).

H (4) Nota keterangan menunjukan bahawa Mokhtar gagal untuk membuktikan wujud apa-apa perjanjian lisan antaranya dan Yang di-Pertua perayu ('PW3') yang memberi kesan bahawa dia boleh menolak RM3,352,250 daripada wang yang dia terima daripada TNB sebagai yuran profesional dan kos (lihat perenggan 36).]

I **Notes**

For cases on High Court, see 2(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 6165–6251.

Cases referred to

Messrs Roland Cheng & Co v Konkamaju Sdn Bhd [2014] 1 MLJ 894, CA (refd)
Mokhtar bin Ngah v Yang Dipertua Majlis Daerah Hulu Terengganu (Majlis Peguam, intervener) [2016] 2 MLRA 492, CA (refd)
Paragon Finance plc v DB Thakerar & Co (a firm); Paragon Finance plc and another v Thimbleby & Co (a firm) [1999] 1 All ER 400, CA (refd)
Westdeutsche Landesbank Girozentrale v Islington London Borough Council [1996] 2 All ER 961; [1996] AC 669, HL (refd)
Zulpadli & Edham v Inai Offshore & Marine Engineering Sdn Bhd (in liquidation) [2011] 4 MLJ 161, CA (refd)

Legislation referred to

Legal Profession Act 1976 ss 99, 103E, 123, 126
Local Government Act 1976 ss 39, 40, 142, 145
Solicitors Accounts Rules 1990 r 7(a)(iv), (a)(v)

Appeal from: Civil Suit No 22–41 of 2001 (High Court, Kuala Terengganu)

Stanley Isaacs (R Vasanthi and Shara Ann Isaacs with him) (Isaacs Tan) for the appellant.
Mokhtar bin Ngah (Mokhtar Ngah & Co) for the respondent.

Suraya Othman JCA (delivering judgment of the court):

INTRODUCTION

[1] The appellant/plaintiff, Majlis Daerah Hulu Terengganu ('Majlis Daerah'), filed a Suit No 22–41 of 2001 ('2001 Suit') against the first respondent, Tenaga Nasional Bhd ('TNB') and the second respondent, Mokhtar bin Ngah ('Mokhtar') in the High Court of Kuala Terengganu to set aside the consent judgment order dated 9 April 2000 recorded in Suit No 25–08 of 1999 ('1999 Suit') entered into between Majlis Daerah and TNB. Majlis Daerah in the 1999 Suit claimed against TNB a cumulative annual assessment for the period of 1999–2004 in respect of TNB's holding in Kenyir Dam, Terengganu. Majlis Daerah was then represented by their solicitor Dato' Mokhtar bin Ngah. The 1999 Suit resulted in a consent judgment being recorded between parties with TNB agreeing to pay RM10m (Ringgit Malaysia ten million) to Majlis Daerah as cumulative annual assessment fees for five consecutive years from 1999–2004. Since RM2,496,000 had been paid by TNB (out of the RM10m) on 18 August 1999, a balance of RM7,504,000 was left and parties agreed that this balance should be paid in three instalments to Mokhtar's firm, Messrs Mokhtar Ngah & Co as solicitors for Majlis Daerah. TNB then paid RM7,504,000 to Mokhtar. Mokhtar retained RM3,407,250 as his purported legal fees for services rendered in the 1999 Suit and paid the balance to Majlis Daerah. It was due to the retention of the RM3,407,250 by

Mokhtar that Majlis Daerah brought this 2001 Suit to set aside the consent judgment order and to seek an order for Mokhtar to refund the entire sum of RM3,407,250 which Mokhtar had retained. The High Court in suit 2001, after a full trial, dismissed Majlis Daerah's claim to set aside the consent judgment. The High Court however refused to entertain and thus did not make any decision on the claim for the refund of RM3,407,250, holding that a civil suit is not the right forum for such a claim and that a matter which involved a dispute as to legal fees should be referred to the Legal Profession Act 1976 (Act 166) ('the LPA 1976'). It is from the decision of this 2001 Suit by the High Court on 31 January 2011 that this appeal lies.

BACKGROUND FACTS

[2] The Majlis Daerah is a local government body incorporated under the Local Government Act 1976 (Act 171) ('the LGA 1976'). Majlis Daerah's primary function is to collect assessment fees for holdings defined under the LGA 1976 and to administer the District of Hulu Terengganu.

[3] In 1999, Majlis Daerah issued to TNB a valuation list which is a notice of annual assessment for the period of 1999–2004 in respect of TNB's holding in Kenyir Dam, Terengganu. TNB being dissatisfied with the annual valuation, objected to the valuation list pursuant to s 142 of the LGA 1976 on the grounds that the holding for which TNB was rateable was valued beyond its rateable value. Majlis Daerah considered the objection and reduced the annual value of the holding as well as the rate of payment. The reduced rate of assessment against TNB was RM4,992,000 per year. TNB being dissatisfied with the revised valuation, appealed to the High Court in Suit No 25–08 of 1999 ('1999 Suit') pursuant to s 145 of the LGA 1976.

[4] Mokhtar was appointed by Majlis Daerah to act on their behalf in the High Court in respect of TNB's appeal (1999 Suit). Pending the hearing and disposal of the said appeal, Majlis Daerah alleged that Mokhtar, without the Majlis's prior approval, entered into a consent judgment on 9 April 2000 for the payment of assessment totalling RM10m (Ringgit Malaysia ten million) by TNB to Majlis Daerah. The consent judgment also provided for Majlis Daerah to receive RM200,000 as agreed costs.

[5] The terms of the consent judgment stated that the payments to Majlis Daerah are to be made to Mokhtar's firm, Messrs Mokhtar Ngah & Co as solicitors for Majlis Daerah. The terms also stated that TNB agreed to pay a total sum of RM10m as agreed assessment and RM200,000 as agreed costs. Since RM2,496,000 had been paid by TNB (out of the RM10m) on 18 August 1999, TNB paid RM7,504,000 being the balance assessment unpaid and RM200,000 as agreed costs to Messrs Mokhtar Ngah & Co. Mokhtar then

forwarded the sum of RM4,351,750 to Majlis Daerah on 23 January 2001 and retained RM3,152,250 as his professional legal fees. In addition, Mokhtar also retained the sum of RM200,000 which was paid to him as party and party costs. Thus, the total amount taken by Mokhtar was RM3,352,250.

[6] Majlis Daerah then filed a Suit No 22–41 of 2001 (suit 2001) against TNB and Mokhtar to set aside the consent judgment dated 9 April 2000 on the basis that it was ultra vires the LGA 1976 as Mokhtar did not have the authority from Majlis Daerah to record it. Majlis Daerah also claimed against Mokhtar for the refund of the monies retained by Mokhtar as his purported legal fees. On 31 January 2011, the High Court in Kuala Terengganu heard the present action (suit 2001) and dismissed Majlis Daerah's claim against TNB and Mokhtar with regard to the setting aside of the consent judgment. However, on the refund of the monies deducted as purported legal fees and retained by Mokhtar, the learned High Court judge declined to decide on the claim, holding that a civil suit is not the right forum for such a claim and that a matter which involved a dispute as to legal fees should be made under the LPA 1976.

[7] Majlis Daerah, dissatisfied, appealed against the decision of the High Court dated 31 January 2011. There were essentially two grounds of appeal and they are as follows:

(a) the learned High Court judge had erred in dismissing the application to set aside the consent judgment against Majlis Daerah and Mokhtar on the ground that Mokhtar did not have the authority to enter the consent judgment without the prior consent or approval of Majlis Daerah; and

(b) the learned High Court judge had erred in refusing to entertain or decide on the claim for an order that Mokhtar returns the monies he had retained from the proceeds of the consent judgment as his purported legal fees for services rendered to Majlis Daerah in the 1999 Suit.

[8] On 15 August 2017, Majlis Daerah filed a notice of discontinuance of the appeal dated 11 August 2017 against TNB. In view of Majlis Daerah's discontinuance of their appeal against TNB, Majlis Daerah was not proceeding in their similar appeal with regard to the consent judgment against Mokhtar. Thus the appeal by Majlis Daerah was solely against Mokhtar for the refund of the RM3,407,250 that was retained by Mokhtar as his purported legal fees from the monies paid by TNB to Majlis Daerah under the consent judgment.

DECISION OF THE HIGH COURT

[9] The learned High Court judge, as stated earlier, refused to entertain and thus did not make any decision on the claim for the refund holding that a civil suit is not the right forum for such a claim and that a matter which involved a

dispute as to legal fees should be made under the LPA 1976.

THE APPEAL

[10] The appellant, Majlis Daerah submitted as follows.

Learned judge had jurisdiction since it was pleaded in the statement of claim

[11] The learned judge was wrong to decline jurisdiction over the claim for the refund of the monies wrongly appropriated by Mokhtar. Majlis Daerah had pleaded its claim on wrongful appropriation by Mokhtar and prayed for a refund of the entire sum.

Money paid by TNB was statutory money Mokhtar was an implied/constructive trustee of the entire monies received

[12] Majlis Daerah contended that the monies paid by TNB under the consent judgment was statutory revenue of a local authority. The monies which were assessment fees charged by Majlis Daerah for TNB's holding of Kenyir Dam were payable by TNB to Majlis Daerah under s 39 of the LGA 1976 and had to be transmitted in its entirety to the Majlis Daerah's Fund under s 40 of the same. Mokhtar's action in arbitrarily appropriating RM3,352,250 was a violation of the LGA 1976 and amounted to a breach of trust. Hence on this ground alone, Majlis Daerah's appeal should be allowed by this court.

Mokhtar did not have a lien or charging order to the monies retained

[13] Mokhtar did not in law have a lien on the monies paid by TNB to Majlis Daerah. Even if there was a right or a lien on the monies, Mokhtar did not act in accordance with the law in that he did not apply for a charging order from the court under s 123 of the LPA 1976 to retain the monies pending taxation of his bill under s 126 of the same.

There was no agreement between Majlis Daerah and Mokhtar for any deduction from the statutory revenue or from the party and party costs as professional fees

[14] Mokhtar failed to prove that there was an oral agreement between the Yang di-Pertua (YDP) Dato' Alim bin Muda (PW3) with Mokhtar in that Mokhtar can deduct RM3,352,250 from the monies received from TNB as his legal professional fees.

Disciplinary board struck Mokhtar off the rolls for misconduct. Mokhtar's appeal to the High Court, Court of Appeal and Federal Court were dismissed and the decision of the disciplinary board upheld

[15] Further, Majlis Daerah had lodged a complaint with the disciplinary board of the Malaysian Bar concerning the misconduct of Mokhtar in retaining/misappropriating Majlis Daerah's money without any prior notice. The disciplinary board held that he had misconducted himself under s 99 of the LPA 1976 and ordered that he be struck off the rolls. He appealed against the decision under s 103E of the LPA 1976 and the High Court dismissed his appeal and upheld the decision of the Disciplinary Board. Dissatisfied, he appealed to the Court of Appeal and on 7 April 2015 the Court of Appeal dismissed his appeal and upheld the High Court's order which affirmed the decision of the disciplinary board to remove him from the rolls. He again appealed to the Federal Court and on 19 January 2017 the Federal Court dismissed his appeal with costs.

[16] The respondent, Mokhtar submitted as follows.

Estoppel/res judicata

[17] TNB and Mokhtar were jointly sued by Majlis Daerah and since Majlis Daerah had withdrawn its appeal against TNB, issues against them as decided in the High Court are final and Majlis Daerah was estopped from raising the same issues again.

A civil suit is a wrong forum/claim should be under the LPA 1976

[18] The claim that costs if excessive was not subject to this suit by way of a writ but was subject to a different forum under the LPA 1976.

There was an oral agreement for payment of fees

[19] There was an oral agreement between Majlis Daerah and Mokhtar that Mokhtar could deduct his legal fees as soon as he received the proceeds of the consent judgment from TNB. Mokhtar had notified Majlis Daerah as required under r 7(a)(iv) and (a)(v) of the Solicitors Accounts Rule 1990.

OUR DECISION

[20] At the commencement of the appeal, learned counsel for Majlis Daerah, Dato' Stanley Isaac, applied orally to amend the amount stated at para 19(C) of the statement of claim from RM3,407,250 to RM3,352,250 due to the fact that RM55,000 had already been paid to Mokhtar by Majlis Daerah as advanced fees prior to the entry of the consent judgment. The amount RM3,352,250 which is claimed by Majlis Daerah is the sum total of RM3,152,250 which Mokhtar deducted as his purported legal fees from the total sum of RM7,504,000 paid by TNB to him and RM200,000 as agreed costs. We allowed the oral amendment.

[21] Learned counsel for the appellant also informed us that the appeal against TNB had been discontinued through their notice of discontinuance dated 11 August 2017 and that they are not proceeding in their similar appeal with regard to the consent judgment against Mokhtar. Thus the appeal by Majlis Daerah was solely against Mokhtar on the second ground of appeal, that is, whether the High Court was correct in its refusal to entertain and thus did not make any decision on the claim by Majlis Daerah for the refund of RM3,352,250 being a sum retained by Mokhtar as his purported legal fees from the monies paid by TNB to Majlis Daerah under the consent judgment.

Whether a civil suit is the right forum and whether the court has jurisdiction

[22] The learned judge held that a civil suit is not the right forum for such a claim and that a matter which involved a dispute as to legal fees should be made under the LPA 1976. The learned judge at para 62 of his grounds of judgment ('GOJ') stated as follows:

> Fee Guaman yang melampau
>
> 62. Berhubung jumlah yang ditolak sebagai fee guaman daripada bayaran penghakiman peguam plaintif mendakwa bahawa jumlah fee yang dikenakan oleh defendan kedua adalah melampau dan tidak wajar. Defendan kedua mendakwa jumlah fee guaman yang dikenakan adalah berpadanan dengan kerja guaman yang dilakukan bagi usul pemula tersebut. *Pada hemat saya forum yang diambil untuk memohon perintah tersebut melalui guaman sivil adalah salah. Pada hemat saya sebarang pertikaian berhubung fee guaman hendaklah dibuat mengikut Akta spesifik berkenaan iaitu, Akta Profession Undang-undang 1976*. (Emphasis added.)

[23] Learned counsel for Majlis Daerah submitted that the learned judge was wrong to decline jurisdiction over the claim for the refund of the monies wrongly appropriated by Mokhtar. Majlis Daerah argued that it had pleaded its claim on wrongful appropriation by Mokhtar and had prayed for a refund of the entire sum. Dato' Mokhtar Ngah, who represented himself, on the other hand, submitted that the claim that costs, if excessive, was not subject to this suit by way of a writ but was instead subject to a different forum under the LPA 1976. The question here then is whether the court in this suit has jurisdiction over a dispute as to legal fees. To answer this, a perusal of the statement of claim is essential.

[24] On perusing the statement of claim, we found that Majlis Daerah had pleaded its claim on wrongful misappropriation against Mokhtar at paras 16–17 and 19 as follows:

> 16. At the request of the District Council, Mokhtar initiated settlement negotiations but wrongfully and in breach of his duties to the District Council, and

acting beyond his authority and without reference to the District Council as to the terms of settlement, Mokhtar concluded an agreement with Tenaga and/or their legal adviser.

PARTICULARS

(i)

...

(ix) *Mokhtar wrongfully kept the payment by Tenaga in his office account contrary to law and also wrongfully retained the cash to himself*;

(x) *Mokhtar wrongfully double charged the District Council and made repeated charges in his bill; and*

(xi) *The fee charged by Mokhtar was never agreed by the District Council as it was arbitrarily and unilaterally determined by Mokhtar alone*.

17. Mokhtar acted in conflict of interest when he agreed to the Consent Judgment.

PARTICULARS

...

(iii) *without the knowledge, authority or consent of the District Council, Mokhtar deducted the sum of RM3,152,250.00 as purported fees from the total sum of RM7,504,000.00 paid by Tenaga to him*;

(iv) *Mokhtar further retained the sum of RM200,000.00 paid by Tenaga to him as costs of the 1999 proceedings, presumably, on a party to party basis*;

(v) Mokhtar has also retained a sum of RM55,000.00 that had previously been paid by the District Council as fees;

(vi) in consequence as a result of the Consent Judgment, *Mokhtar had been paid a total sum of RM3,407,250.00 which sum was grossly exorbitantly and unconscionably an overcharge for the services rendered by Mokhtar particularly having regard to the fact that the 1999 proceedings did not proceed to trial but was settled at a very early stage.*

...

19. By the matters aforesaid and the conduct of Tenaga and Mokhtar, the District Council has suffered loss and damage.

Accordingly, the District Council prays:

...

(C) *As against Mokhtar*:

7. *An Order that Mokhtar refunds the entire sum of RM3,407,250.00 to the District Council that he wrongfully appropriated as costs for services allegedly rendered to it in the 1999 proceedings*;

8. *In the alternative, an Order that Mokhtar refunds the said sum of RM3,407,250.00 to the District Council after deducting a fair and reasonable amount to be determined by this Honourable Court to represent his costs for acting in the 1999 proceedings.* (Emphasis added.)

[25] In such circumstances, where a claim for wrongful misappropriation had been specifically pleaded against Mokhtar and counsel for Majlis Daerah had particularised in detail the nature and conduct that amounted to misappropriation and consequently prayed for a refund of the entire sum misappropriated, the learned judge was wrong to decline to entertain such a claim. The learned judge's disinclination to adjudicate was premised on his misconceived notion that a civil suit is a wrong forum for such a claim and that in matters which involved dispute as to legal fees should be brought under the purview of the LPA 1976. In taking this stance, His Lordship had certainly erred and we were in agreement with counsel for Majlis Daerah that the learned judge had failed to have regard to the fact that the monies that were taken by Mokhtar were statutory revenue and as a solicitor entrusted with the monies by Majlis Daerah, the appropriation by deducting a sum therefrom, for whatever reason, without the consent of Majlis Daerah, was untenable. As such, a civil suit was the correct forum and the court did have jurisdiction to adjudicate on the claim.

Monies paid by TNB was statutory money

Monies paid into Mokhtar's firm as stakeholder and Mokhtar held as constructive trustee for Majlis Daerah

[26] Majlis Daerah contended that the monies paid by TNB under the consent judgment was statutory revenue of a local authority. The monies which were assessment fees charged by Majlis Daerah for TNB's holding of Kenyir Dam were payable by TNB to Majlis Daerah under s 39 of the LGA 1976 and had to be transmitted in its entirety to the Majlis Daerah's Fund under s 40 of the same. Mokhtar's action in arbitrarily appropriating RM3,352,250 was in violation of the LGA 1976 and amounted to a breach of trust. Hence on this ground alone, Majlis Daerah's appeal should be allowed by this court. The cases of *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] 2 All ER 961; [1996] AC 669 and *Paragon Finance plc v DB Thakerar & Co (a firm); Paragon Finance plc and another v Thimbleby & Co (a firm)* [1999] 1 All ER 400 were cited in support.

[27] We were in agreement with counsel for Majlis Daerah's contention that the monies paid by TNB to Mokhtar's firm under the consent judgment were statutory revenue to be transmitted in its entirety into Majlis Daerah's Fund and that the retention by Mokhtar of RM3,352,250 was in violation of the LGA 1976 and amounted to a breach of trust. Further, the monies were paid into Mokhtar's firm as stakeholder and Mokhtar, as solicitor for the Majlis Daerah, held the monies as a constructive trustee on behalf of Majlis Daerah. The terms of the consent order dated 9 April 2000 are as follows:

DALAM MAHKAMAH TINGGI MALAYA DI KUALA TERENGGANU

DALAM NEGERI TERENGGANU DARUL IMAN
USUL PEMULA NO 25-08-1999

Dalam Perkara Rayuan Oleh Tenaga Nasional Berhad menurut Seksyen 145, Akta Kerajaan Tempatan, 1976.

Dan

Dalam perkara keputusan Mesyuarat Jawatankuasa Penilaian Majlis Daerah Hulu Terengganu bertarikh 22/7/99 berkenaan dengan Penilaian Nilai Tahunan dan Cukai Taksiran yang dikenakan oleh Majlis Daerah Hulu Terengganu ke atas Lot PT 5068, Mukim Jenagor, Daerah Hulu Terengganu, Terengganu (Stesen Janaelektrik Sultan Mahmud, Tasik Kenyir)

Dan

Dalam perkara Aturan 8, Kaedah-Kaedah Mahkamah Tinggi, 1980.

ANTARA

TENAGA NASIONAL BERHAD ... PEMOHON

DAN

MAJLIS DAERAH HULU TERENGGANU ... RESPONDEN

DIHADAPAN YANG ARIF HAKIM
DATO' HAJI ABDUL KADIR BIN SULAIMAN
HAKIM, MAHKAMAH TINGGI, KUALA TERENGGANU,
PADA 9 HARIBULAN APRIL, 2000 DALAM MAHKAMAH TERBUKA

PENGHAKIMAN

TINDAKAN INI TELAH DITETAPKAN untuk perbicaraan pada 3hb November,

1999 dengan kehadiran Encik Gurmel Singh Peguamcara bagi pihak Pemohon dan Encik Mokhtar Ngah Peguamcara bagi pihak Responden dan telah ditunda kepada 14hb Februari, 2000 dengan kehadiran Encik Mohamad Illiayas dan Encik Gurmel Singh Peguamcara bagi pihak Pemohon dan Encik Mokhtar Ngah Penguamcara bagi pihak Responden dan ditunda kepada 2hb April, 2000 dengan kehadiran Encik Gurmel Singh Peguamcara bagi pihak Pemohon dan Encik Mokhtar Ngah Peguamcara bagi pihak Responden dan ditunda kepada 9hb April, 2000 dengan kehadiran Encik Gurmel Singh Peguamcara bagi pihak Pemohon dan Encik Mokhtar Ngah Peguamcara bagi pihak Responden. SETELAH MENDENGAR Peguamcara-Peguamcara tersebut ADALAH DENGAN INI DIPERINTAHKAN DENGAN PERSETUJUAN seperti berikut:

1. Cukai Taksiran Tahunan bagi harta yang dipegang di bawah Lot PT 5068, Mukim Jenagor, Daerah Hulu Terengganu, Terengganu pada kadar RM2,000.000.00 setahun berkuatkuasa dari 1hb Julai, 1999 untuk lima tahun berikutnya sehingga 30hb Jun, 2004 berjumlah RM10,000,000.00 handaklah dibayar oleh Pemohon kepada Responden seperti di dalam Perenggan 2 di bawah.

2. Setelah mengambil kira RM2,496,000.00 pendahuluan yang telah dibayar oleh Pemohon kepada Responden pada 18hb Ogos, 1999 maka baki yang perlu dibayar oleh Pemohon dari jumlah RM10,000,000.00 di atas adalah RM7,504,000.00. Masa untuk pembayaran baki RM7,504,000.00 tersebut adalah seperti berikut:

   i) Bayaran Pertama sebanyak RM2,500,000.00 dibuat di dalam tempoh 21 hari dari tarikh perintah ini;

   ii) Bayaran Kedua sebanyak RM2,500,000.00 dibuat sebelum atau pada 1hb Julai, 2000; dan

   iii) Bayaran Ketiga sebanyak RM2,504,000.00 dibuat sebelum atau pada 31hb Januari, 2001.

3. Pemohon membayar sebanyak RM200,000.00 kepada Responden/Peguamcaranya sebagai kos dipersetujui dalam tempoh 7 hari dari tarikh perintah.

4. *Semua pembayaran di atas hendaklah dibayar kepada Tetuan Mokhtar Ngah & Co sebagai Peguamcara Responden.*

Bertarikh pada 9 haribulan April, 2000.

Penolong Kanan Pendaftar
Mahkamah Tinggi
Kuala Terengganu (Emphasis added.)

[28] The English translation of the consent order is as follows:

IN THE HIGH COURT OF MALAYA AT KUALA TERENGGANU
IN THE STATE OF TERENGGANU DARUL IMAN
ORIGINATING MOTION NO 25-08-1999

In the matter of the Appeal by Tenaga Nasional Berhad pursuant to Section 145, Local Government Act, 1976.

AND

In the matter of the decision of the Meeting of the Valuation Committee of the Hulu Terengganu District Council dated 22/7/99 regarding the Annual Value and Assessment imposed by the Hulu Terengganu District of Hulu Terengganu, Terengganu (Sultan Mahmud Power Station, Tasik Kenyir)

AND

In the matter of Order 8, Rules of the High Court, 1980.

BETWEEN

TENAGA NASIONAL BERHAD ... APPLICANT

AND

HULU TERENGGANU DISTRICT COUNCIL ... RESPONDENT

BEFORE THE HONOURABLE JUSTICE
DATO' HAJI ABDUL KADIR BIN SULAIMAN
JUDGE, HIGH COURT, KUALA TERENGGANU,
THIS 9 DAY OF APRIL, 2000 IN OPEN COURT

JUDGMENT

THIS ACTION HAVING BEEN FIXED for hearing on 3rd November, 1999 in

the presence of Mr Gurmel Singh of Counsel for the Applicant and Encik Mokhtar Ngah of Counsel for the Respondent and having been adjourned to 14th February, 2000 in the presence of Encik Mohamad Illiayas and Mr Gurmel Singh of Counsel for the Applicant and Encik Mokhtar Ngah of Counsel for the Respondent and having been adjourned to 2nd April, 2000 in the presence of Mr Gurmel Singh of Counsel for the Applicant and Encik Mokhtar Ngah of Counsel for the Respondent and adjourned to 9th April, 2000 in the presence of Mr Gurmel Singh of Counsel for the Applicant and Encik Mokhtar Ngah of Counsel for the Respondent. UPON HEARING Counsel as aforesaid IT IS HEREBY ORDERED BY CONSENT as follows:

1. Annual Assessment for the property held under Lot PT 5068, Mukim Jenagor, Daerah Hulu Terengganu, Terengganu at the rate of RM2,000.000.00 per annum with effect from 1st July, 1999 for five consecutive years until 30th June, 2004 amounting to RM10,000,000.00 is to be paid by the Applicant to the Respondent as set out in Paragraph 2 below.

2. Having taken into account the advance of RM2,496,000.00 which had been paid by the Applicant to the Respondent on 18th August, 1999 thus the remainder that has to be paid by the Applicant from the sum of RM10,000,000.00 above is RM7,504,000.00. The time for payment of the said remainder RM7,504,000.00 is as follows:

   i) First payment of RM2,500,000.00 to be made within 21 days from the date of this order;

   ii) Second payment of RM2,500,000.00 to be made by or before 1*st* July, 2000; and

   iii) Third Payment of RM2,504,000.00 to be made by or before 31*st* January, 2001.

3. The Applicant to pay the sum of RM200,000.00 to the Respondent/its Solicitors as agreed costs within 7 days from the date of this order.

4. *All payments above are to be paid to Messrs Mokhtar Ngah & Co as Solicitors for the Respondent.*

Dated the 9th day of April, 2000.

Senior Assistant Registrar
High Court
Kuala Terengganu (Emphasis added.)

[29] From a perusal of the consent order, the term at para 4 is very clear that all payments under the consent order are to be paid to Messrs Mokhtar Ngah

& Co as solicitors for the respondent. As such, and as stated earlier, Mokhtar as solicitor of the Majlis Daerah held the monies in trust, as stakeholder for Majlis Daerah.

Whether Mokhtar has a lien or charging order to the monies retained

[30] Mokhtar argued that he has at common law a right or lien over the monies he retained since it was due to his efforts that Majlis Daerah was able to collect the assessment fees due to them through the consent judgment that was recorded by him as solicitor for Majlis Daerah with TNB. In this court's case of *Messrs Roland Cheng & Co v Konkamaju Sdn Bhd* [2014] 1 MLJ 894 (CA), the court held that at common law a solicitor has a right or lien to retain property in his possession until the full amount of the solicitors taxed costs payable by the client is paid. At para 25 of that case it is stated as follows:

> [25] *At common law a solicitor has a right or lien to retain property in his possession until he is paid costs due to him in his professional capacity* — see para 226 *Halsbury's Laws of England* Vol 44 (4th Ed). In the same volume of *Halsbury's Laws of England*, at para 229 the following passage is found:
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> > A solicitor having a retaining lien over property in his possession is *entitled to retain the property as against the client,* and all persons claiming through him and having no better right than the client, *until the full amount of the solicitors taxed costs payable by the client is paid.* (Emphasis added.)

[31] On the other hand, Majlis Daerah submitted that the monies retained by Mokhtar are statutory revenue which go into the local authority fund under s 40 of the LGA 1976. Majlis Daerah argued that Mokhtar did not in law have a lien on the monies paid by TNB to Majlis Daerah and even if there was a right or a lien on the monies, Mokhtar did not act in accordance with the law in that he did not apply for a charging order from the court under s 123 of the LPA 1976 to retain the monies pending taxation of his bill under s 126 of the same.

[32] Sections 123 and 126 of the LPA 1976 state as follows:

> 123 Advocate and solicitor entitled to charge on property for costs
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> Any court in which an advocate and solicitor has been employed to prosecute or defend any suit, matter or proceeding may at any time declare the advocate and solicitor entitled to a charge on the property recovered or preserved in such suit, matter or proceeding for such advocate and solicitor's taxed costs in reference to that suit, matter or proceeding, and may make such orders for taxation of the costs and for raising money to pay, or for paying, the costs out of the property as it thinks fair and reasonable, and all conveyance and acts done to defeat, or operating to defeat, that charge shall, except in the case of a conveyance to a bona fide purchaser for value without notice, be void as against to advocate and solicitor.
>
> ...

126 An order for taxation of costs to be made within 6 months of delivery of bill of costs.

(1) An order for the taxation of a bill of costs delivered by any advocate and solicitor may be obtained by a petition as a matter of course by the party chargeable therewith, or by any person liable to pay the cost either to the party chargeable or to the advocate and solicitor, *at any time within six months from the delivery of the bill, or, by the advocate and solicitor after the expiration of one calendar month, and within a year from, the delivery.*

... (Emphasis added.)

[33] Having perused the case of *Messrs Roland Cheng* and ss 123 and 126, though we agreed that Mokhtar may have a right or lien over the monies under common law, but Mokhtar had failed to adhere to the statutory provisions of s 123 to apply to the court for a charging order and then subsequently to apply for an order for taxation of costs after delivery of his bill as provided under s 126 of the LPA 1976.

[34] As such, in this matter we were in agreement with the contention by Majlis Daerah that Mokhtar must obtain a charging order from the court under s 123 pending taxation of his bill under s 126. His right or lien over the monies from the proceeds of the consent judgment, whether under common law or statute, in our view was not enforceable unless he had obtained a charging order from the court in which he had acted as solicitor and in our instant case, in the 1999 Suit where the consent judgment was recorded on 9 April 2000. This court's case of *Zulpadli & Edham v Inai Offshore & Marine Engineering Sdn Bhd (in liquidation)* [2011] 4 MLJ 161 is in point where it was held at para 20 as follows:

[20] In effect, *s 123 of the LPA stipulates that the court to declare an advocate and solicitor entitled to a charge on the property recovered or preserved is the court in which that advocate and solicitor has been employed to prosecute or defend, and in which that property has been recovered or preserved*. The court below was not that court. As a matter of fact, there was no such court, as the property (RM12m) was not recovered under any judgment. It comes down to this. *The lien of the appellant, if any, be it under common law or statute, could only be enforced by a charging order* (see *SAW CHING HO & ANOR v TAN AH KUI* [1970] 1 MLJ 104, *where Sharma J held that with a charging order under s 89 of the Advocates and Solicitors Ordinance 1947, 'the costs have to be taxed'*, and *Emden v Carte* (1881) 19 Ch D 311, where it was held by Fry J that it is the duty of the judge, when declaring a solicitor entitled to a charge upon the property recovered or preserved in an action, to limit the order to costs properly incurred in recovering or preserving the property; but see In re Clayton; *Re Clayton, Collins v Clayton and Others* [1940] 2 All ER 233; [1940] Ch 539, where it was held by Moron J that the general principle is to give a solicitor a reward and therefore a wider charge). (Emphasis added.)

There was an oral agreement between Majlis Daerah and Mokhtar for Mokhtar to

deduct his legal fees from the proceeds of the consent judgment

[35] Mokhtar submitted that there was an oral agreement between him and the Yang di-Pertua (YDP) that he can deduct RM3,152,250 from the monies received from TNB as his legal professional fees and that he had notified Majlis Daerah as required under r 7(a)(iv) and (v) of the Solicitors Accounts Rule 1990. Majlis Daerah contended that there was no such oral agreement. In cross-examination of Mokhtar at *Bahagian* B *Jld* 1/3 record of appeal, p 266, Mokhtar who was the second respondent when questioned on whether there was an agreement reached on the figure RM3.1m said this:

Q: Where does the figure of RM3.1 million mentioned?

A: Persetujuan adalah secara lisan dan dimaklumkan dan dipersetujui oleh YDP dan disahkan oleh tandatangan beliau dan juga pembayaran ini adalah diatas bil/invois kami seperti mana di E p 114/D23.

Q: With whom in MDHT did you reach this oral agreement lodged?

A: YDP sendiri, Dato' Alim bin Muda.

Q: The YDP is PW3 Dato' Alim bin Muda who testified earlier?

A: Benar.

Q: His testimony was that there was no such oral agreement. Your comment.

A: Beliau telah menafikan segalanya dan saya percaya di atas nasihat peguamcara terkini.

[36] From the above notes of evidence, Mokhtar had failed to prove that there was an oral agreement between the Yang di-Pertua (YDP) Dato' Alim bin Muda ('PW3') with Mokhtar in that Mokhtar could deduct RM3,352,250 from the monies received from TNB as his legal professional fees. In cross-examination, Mokhtar had agreed that PW3 had in his testimony denied that there was such an oral agreement and explained that it was his belief (Mokhtar) that such denial was due to the advice received by PW3 from its current solicitor. Further, there was no proof either that there was an agreement that Mokhtar could keep the agreed costs of RM200,000 since this was not elicited in evidence and neither was there an invoice issued to that effect.

Disciplinary board struck Mokhtar of the Rolls for misconduct. Mokhtar's appeal to the High Court, Court of Appeal and Federal Court were dismissed and the decision of the disciplinary board upheld

[37] Mokhtar was struck off the rolls of the advocate and solicitors of the High Court in Malaya due to his misconduct. Majlis Daerah had lodged a complaint with the disciplinary board of the Malaysian Bar concerning the misconduct of Mokhtar in retaining Majlis Daerah's monies without any prior notice or consent. The Disciplinary Board held that he had misconducted

himself under s 99 of the LPA 1976 and ordered that he be struck off the rolls. He appealed against the decision under s 103E of the LPA 1976 and the High Court dismissed his appeal and upheld the decision of the disciplinary board. Dissatisfied, he appealed to the Court of Appeal and on 7 April 2015 the Court of Appeal dismissed his appeal and upheld the High Court's order which affirmed the decision of the disciplinary board to remove him from the rolls. In this court's decision of *Mokhtar bin Ngah v Yang Dipertua Majlis Daerah Hulu Terengganu (Majlis Peguam, intervener)* [2016] 2 MLRA 492 at paras 29 and 35–36, this court found as follows:

> [29] The DC found that the conduct of the appellant 'was motivated by self-interest, dishonest in nature and unbefitting of an advocate and solicitor'. Having regard to the seriousness and gravity of the misconduct, the DC recommended that the appellant be struck off the Roll. We have also scrutinised the DC's report dated 30 November 2012. We note that the DC report is a comprehensive report comprising of eleven pages. There is nothing to indicate that the DC took into account any irrelevant factor or failed to consider any relevant factor in making their findings. We are satisfied that the DC's decision is based on a proper consideration and evaluation of the oral and documentary evidence and arguments relating to the impugned consent judgment and the legal fees.
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> ...
>
> [35] The DC's recommendation to the DB was made after a full and thorough evaluation of the evidence adduced at the DC hearing. The fact remains that the complaint relates to the appellant's misconduct in misappropriating the substantial sum of RM3,407,250 belonging to the respondent. The DC found that the appellant's act of deducting the monies without any prior notice to the respondent is in violation of r 7(a)(v) of the Solicitors' Account Rules 1990. More significantly, the DC found that the appellant's conduct in entering into the impugned consent judgment without first obtaining the respondent's consent and the act of deducting the said sums without giving prior notice to the respondent was motivated by self-serving interest, dishonest in nature and unbefitting of an advocate and solicitor. Accordingly, we do not think that the argument advanced make out a strong case to warrant curial interference with the sentence imposed.
>
> [36] It is trite law that the court takes a very serious view of improper dealings with client's money such that the severe sanction of striking off the rolls is justified.

[38] Mokhtar again appealed to the Federal Court under s 103E of the LPA 1976 and on 19 January 2017 the Federal Court dismissed his appeal with costs. The courts took a serious view of Mokhtar's misconduct and affirmed the decision of the disciplinary board which found that Mokhtar's 'act of deducting the monies without any prior notice to the respondent is in violation of r 7(a)(v) of the Solicitors' Account Rules 1990' and his conduct 'was motivated by self-serving interest, dishonest in nature and unbefitting of an advocate and solicitor' and that 'having regard to the seriousness and gravity of the misconduct, the DC recommended that the appellant be struck off the Roll'. The Court of Appeal found that 'there is nothing to indicate that the DC took

into account any irrelevant factor or failed to consider any relevant factor in making their findings'. In fact, they were satisfied that the 'DC's decision is based on a proper consideration and evaluation of the oral and documentary evidence and arguments relating to the impugned consent judgment and the legal fees' and they felt that the argument advanced by Mokhtar did not 'make out a strong case to warrant curial interference with the sentence imposed'.

[39] In the upshot, based on the reasons above, we were of the view that the High Court judge had erred in law in declining to adjudicate on the claim by Majlis Daerah for the refund of the monies retained by Mokhtar. The High Court had the jurisdiction to hear the case and make a decision on it. As such, appellate intervention was warranted and we accordingly allowed the appeal against Mokhtar with no order as to costs. We set aside the order of the High Court dated 31 January 2011 to the extent that the appellant Majlis Daerah's claim against Mokhtar in prayer 19(C)(7) of the statement of claim, as amended, for the refund of the sum of RM3,352,250 retained by Mokhtar was allowed. The sum of RM5,000 as costs to be paid to Mokhtar in the same order was also set aside. Deposit, if any, is refunded.

Appeal allowed; appellant's claim for RM3,352,250 against the second respondent allowed.

Reported by Ashok Kumar